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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARK ALAN RING, Defendant and Appellant.	G047315 (Super. Ct. No. 10HF1919) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Mark Alan Ring of possession of methamphetamine for sale (Health & Saf. Code, § 11378), and possession of hydrocodone (Health & Saf. Code § 11350, subdiv. (a)). Ring contends his trial attorney rendered constitutionally ineffective assistance by failing to bring a midtrial motion to suppress evidence (Pen. Code, § 1538.5, subd. (h))[1] after a police officer testified she opened his car door, which Ring asserts lacked legal justification. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 23, 2010 around 12:30 a.m., Irvine Police Officer Nicole Frantz observed Ring's car blocking the driveway of a hotel parking lot. Ring was asleep in the backseat. After backup arrived, the officers approached Ring's car, knocked on the window, and shined flashlights in Ring's face. Ring appeared disoriented. Frantz opened the rear passenger side door, identified herself, and asked Ring what he was doing. He replied his vehicle had broken down and he had called his daughter to pick him up. The officer asked Ring to exit the vehicle, and asked him if he had anything illegal inside. Ring said no. The officer asked if she could search his person and he said "yes." She then asked if she could search his vehicle, and he replied "yes."

Searching the vehicle, the officers found a black bag in the back seat next to where Ring had been. The bag contained six smaller Ziploc baggies, a spoon with white cotton, a small digital scale, two methamphetamine pipes, a lighter, four syringes, papers with numbers written on them, and two inoperable cell phones. Ring had a third working cell phone on his person. Ring admitted the black bag belonged to him. Five of the

[1] All further undesignated statutory references are to the Penal Code unless otherwise indicated.

baggies contained methamphetamine in various amounts. The sixth baggie contained four hydrocodone pills. A drug sales expert opined at least some of the methamphetamine was possessed for purposes of sale.

Following trial in January 2011, a jury found Ring guilty of possession of methamphetamine for sale and possession of hydrocodone. In June 2011, the court sentenced Ring to the middle term of two years in prison for the methamphetamine conviction, plus three years for a prior drug-related conviction (Pen. Code, § 11370.2, subd (c)).

II

DISCUSSION

Before trial, Ring filed a motion to suppress evidence as the product of an illegal search or seizure (§ 1538.5). The prosecution filed opposition asserting, among other things, sleeping in a vehicle at the time of the encounter violated the city's municipal code, and Ring appeared "possibly" under the influence of a drug or alcohol. The prosecution also asserted the initial contact was a "consensual encounter" and Ring subsequently agreed to a search of the vehicle.

Ring's assigned deputy public defender who filed the suppression motion resigned suddenly. Ring's newly appointed deputy public defender subsequently asked the court to take the suppression motion off calendar because Ring refused to agree to a trial date continuance, explaining he was "tired" and did not "want to come to court anymore." The deputy public defender did not attempt to file another suppression motion. Counsel explained after trial during a *Marsden* hearing he did not file a motion because he had been assigned to the case four days before trial and Ring "was positive" and "confirmed it . . . multiple times" "that he did not want to waive time" and continue

the trial. Counsel explained to Ring there would be no motions without a time waiver. Counsel also felt prior counsel's motion to suppress lacked merit because it did not state specific allegations, and he did not want to argue the motion as written. Counsel informed Ring a suppression motion had only a "slim" chance of prevailing because the officer would testify Ring had consented to the search.

Ring contends his trial counsel acted ineffectively by failing to move to suppress evidence *during trial* under section 1538.5, subdivision (h). "To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.]'" (*People v. Hart* (1999) 20 Cal.4th 546, 623.) Prejudice occurs only if the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Lucero* (2000) 23 Cal.4th 692, 728.) In the present context, the defendant must demonstrate the suppression motion would have been successful (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437).

A meritless motion could not affect the trial outcome and therefore an attorney does not render ineffective assistance for failing to raise the issue. Even if the motion appears to have merit, but "'"the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citation.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*).)

Section 1538.5 provides in relevant part: "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (A) The search or seizure without a warrant was unreasonable. . . ." Ordinarily the motion is made at the preliminary hearing, or at a special hearing before trial. (§ 1538.5, subd. (i).) But subdivision (h) of section 1538.5 provides, "If, prior to the trial of a felony or misdemeanor, *opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial.*" (Italics added.)

Given the italicized language in subdivision (h), a motion filed during trial would not have been successful because Ring had an opportunity to bring the motion before trial, and he also was aware of the grounds for bringing the motion. As noted above, Ring filed a motion to suppress evidence seized from the car before trial, the prosecution opposed the motion, and Ring elected to take the matter off calendar and proceed to trial without recalendaring or filing another motion. Ring refused to continue the trial to allow counsel to file a new motion.

The record is clear the defense was well aware before trial Frantz "opened Mr. Ring's car door." This fact was contained in Frantz's police report dated October 25, 2010, and attached to Ring's motion to discover officer personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.5, 832.8) dated December 30, 2010, and filed with the court January 3, 2011, the same day Ring filed the original motion to suppress. Frantz wrote in her report, "I opened the back passenger door and identified myself as an Irvine police officer and asked the male if he needed assistance." Frantz explained that while conversing with Ring about why he was sleeping in the car

and obtaining identifying information, Frantz noticed "[Ring] appeared very confused and disoriented. Believing that Ring could possibly be under the influence of a drug or alcohol, coupled with the fact that he was in violation of [the municipal code] and [Frantz] asked [Ring] if he would step out of the vehicle, and he complied." The same facts were mentioned in the prosecution's opposition papers to the original suppression motion. The facts of the encounter were certainly known to Ring himself before trial since he was in the car at the time of the search. Because Ring did not have the right during trial to make a suppression motion under subdivision (h) the failure to lodge such a futile motion does not constitute ineffective assistance.

Ring's arguments on appeal are not entirely clear on whether he claims his lawyer acted ineffectively in failing to file a suppression motion *before* trial. Regardless, a motion to suppress evidence before or during trial was unlikely to succeed based on the limited record before us. (*Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) There is no evidence Frantz "*entered* [] Ring's car . . . without his consent." (Italics added.) True, Frantz *opened* the car door, which may have been a "warrantless search," but one that evidently produced no evidence, and directed Ring out of the car. The officer acted reasonably in opening the door to investigate whether Ring violated Irvine's municipal code against sleeping in a vehicle and to ascertain whether Ring was under the influence of drugs or alcohol. While conducting her investigation, the officer was entitled to ask Ring to exit the car for officer safety purposes. (*People v. Harris* (1986) 184 Cal.App.3d 1319, 1320 [officer properly told appellant to get out of his vehicle "'to make sure that he was okay and just check on his well being'"; no detention occurred because there was no indication appellant was not free to leave]; *Pennsylvania v. Mimms* (1977) 434 U.S. 106 [officer safety is a legitimate reason to order a person out of their vehicle]; *People v.*

Lively (1992) 10 Cal.App.4th 1364 [an officer's order that an intoxicated person get out of legally parked vehicle permissible].) The limited record also reflects Ring consented to the search of the car that followed. Consent to a search obtained from a person who is legally detained is valid. (*People v. Lawler* (1973) 9 Cal.3d 156, 163 [consent valid if not obtained by unlawful conduct].)

In any event, because no suppression motion was brought, "[n]o one gave [the officer] the opportunity to point to any specific and articulable facts justifying [her] actions. Nor did the prosecution have the opportunity to offer some other possible reason not to suppress the evidence." As the Supreme Court in *Mendoza Tello*, *supra*, 15 Cal.4th at p. 267 observed, "[p]erhaps, as the majority below assumed, [the officer] would have had no good reason [to search]. But perhaps he did have a reason, of which defense counsel was aware, and which justified counsel's actions. Perhaps there was some other reason not to suppress the evidence. An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." The appellate record does not support Ring's contention trial counsel rendered constitutionally ineffective assistance in failing to bring a suppression motion.[2]

[2] The clerk's transcript contains an order by the trial court denying Ring's petition for writ of habeas corpus. The order reflects Ring claimed, among other things, counsel was ineffective for failing to file a pretrial motion to suppress. The trial court summarily denied the petition for failure to state a prima facie basis for relief.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.